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Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

TEMPLE BNAI SHALOM OF GREAT NECK,
a Corporation Organized under the
New York Religious Corporation Law,

Petitioner,

v.

VILLAGE OF GREAT NECK ESTATES
and FLORENCE RISMAN, COUNTY CLERK OF
NASSAU COUNTY and STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK STATE SUPREME COURT,
APPELLATE DIVISION, SECOND DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Have the New York State courts refused to apply the rule of law established in *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708 (2006) where in this case they held that Petitioner Temple Bnai Shalom of Great Neck ("petitioner") was not deprived of due process under the United States Constitution when, pursuant to the applicable New York State statute, Respondent Florence Risman sent petitioner a notice of redemption of its property after a tax sale by certified mail only which was returned by the Post Office as unclaimed, and neither Ms. Risman nor Respondent Village of Great Neck Estates took any additional steps to notify petitioner of its right to redeem the property ?

LIST OF PARTIES

The parties below are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court, Petitioner hereby states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

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The Decision and Order of the New York State Supreme Court, Appellate Division, Second Department is reported at *Temple Bnai Shalom of Great Neck v. Village of Great Neck Estates*, 32 A.D.3d 391, 820 N.Y.S.2d 104 (2d Dept. 2006). The New York State Court of Appeals denied petitioner's motion for leave to appeal and appeal as of right on constitutional grounds on May 3, 2007. 8 N.Y.3d 813, 868 N.E.2d 235, 836 N.Y.S.2d 552 (2007). By Order rendered on September 6, 2007 the New York State Court of Appeals denied petitioner's motion for reargument of the motion for leave to appeal. 9 N.Y.3d 899, 874 N.E.2d 745, 842 N.Y.S.2d 778 (2007).

The orders and judgment of New York State Supreme Court, Nassau County, affirmed by the Appellate Division, Second Department are unreported. *See* Appendices A-F.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

The Decision and Order of the New York Supreme Court, Appellate Division, Second Department was rendered on August 1, 2006. In an Order entered November 16, 2006, the Second Department denied petitioner's timely motion for leave to appeal to the New York State Court of Appeals. In an Order rendered May 3, 2007 the New York State Court of Appeals denied petitioner's motion for leave to appeal and appeal as of right on constitutional grounds. By Order rendered on

September 6, 2007 the New York State Court of Appeals denied petitioner's motion for reargument of the motion for leave to appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

New York Real Property Tax Law § 1464(1)

§ 1464. Application for deed; conveyance by village treasurer

> 1. If any parcel of real property sold for taxes pursuant to section fourteen hundred fifty-four of this chapter is not redeemed within a period of two years, the owner of the certificate of sale may commence an action to foreclose his tax lien pursuant to law or may make application for conveyance to him by deed of the real property described in such certificate. Before making such application the owner of such tax certificate shall serve a notice to redeem by certified or registered mail upon the record owner, and mortgagee if any, of the real property affected by such tax certificate by mailing the same to him using his name and address as it appears on the records of the collecting officer. *** If the real property or any part thereof is in the actual occupancy of any person, a further notice to redeem shall be served on the occupant personally, by leaving the same at the residence of the occupant with a person of suitable age and discretion belonging to his family or by mailing the same by certified or registered mail. ***

Constitution of the United States

Amendment XIV

Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

When Ona Guthartz ("Mrs. Guthartz"), the owner of the real property located at 68 Clover Drive, Great Neck Estates, New York ("the property"), failed to pay the 1996-1997 Village of Great Neck Estates ('the Village") real property taxes when due, the Village held a public sale of tax liens in 1998, including the lien on the property. Notice of the tax lien sale was solely by publication pursuant to the statutory provisions of New York Real Property Tax Law ("NY RPTL") § 1452. Respondent Florence Risman ("Ms. Risman") purchased the tax lien for the property for $7,568.98 in April 1998.

Unaware of the sale of the tax lien on her property, Mrs. Guthartz sold the property to petitioner by deed dated December 29, 2000 for $965,000, the fair market value of the property. Alan Guthartz ("Mr. Guthartz"), Mrs. Guthartz's husband and President of petitioner, performed the title search by searching the records of the Nassau County Clerk. He did not search the public records of the Village where the Village tax records were maintained. Therefore, he did not discover record of the unpaid 1996-1997 taxes and the sale of the tax lien to Ms. Risman. In January 2001 petitioner notified the Village that it had acquired title to the property and applied for an exemption from real property taxes.

Upon the expiration of the statutory waiting period, Ms. Risman followed the procedure required by NY RPTL § 1464 to notify interested persons of the right to redeem the property from the tax lien which she had purchased. On May 24, 2001 Ms. Risman sent a "Notice of Redemption of Lands Sold for Taxes by Village" to petitioner, Mrs. Guthartz, and Mr. Guthartz, by certified mail, return receipt requested only as required by the statute, informing them that they had six months within which to redeem the property from the tax lien, or the property would be sold to Ms. Risman. Ms. Risman's affidavit of service of the notice of redemption states that "she caused to be served the above notice by Certified Mail, Return Receipt Requested, on each of the persons or corporations named therein ***." Ms. Risman submitted a further affidavit in November 2001 to the Village to obtain the Treasurer's Deed to the property and she swore "that she served the said Temple Bnai Shalom of Great Neck, Ona & Alan Guthartz a 'Notice of Redemption of Lands Sold for Taxes by Village' by certified mail on the 24th day of May, 2001 ***."

Thus, both of Ms. Risman's affidavits of service of the Notice of Redemption refer to service by certified mail, return receipt requested only, and there is no mention of regular mail service. It is undisputed by the parties that (1) each of the certified mailings were returned by the postal service to Ms. Risman as "unclaimed"; (2) Ms. Risman and the Village took no other steps to notify petitioner of its right to redeem the property after the certified mail notice was returned unclaimed; (3) petitioner never received or claimed the Notice of Redemption sent by certified mail; and (4) petitioner failed to redeem the property from the tax lien within the statutory time period. On December 7, 2001 the Village issued a Treasurer's Deed to the property to Ms. Risman.

Petitioner commenced this action in August 2002 to vacate the Treasurer's Deed from the Village to Ms. Risman as unconstitutional. Petitioner's Amended Verified Complaint alleges that the State mandated procedures followed by the Village and Ms. Risman are unconstitutional because they deprived petitioner of its property without due process of law.

By Order dated August 20, 2004, New York State Supreme Court, Nassau County held that petitioner lacked standing to challenge the constitutionality of the tax lien sale since it was not the record owner at the time the lien was issued or at the time of the tax lien sale, and that petitioner was not entitled to notice of the sale because its existence was unknown. In an Order dated May 4, 2005, the court denied petitioner's motion to renew and reargue, and held that it did not overlook or misapprehend petitioner's due process argument.

Judgment was entered against petitioner on May 25, 2005 which ordered, adjudged and decreed that petitioner be barred from all claims to an interest in the property, and granted Ms. Risman an absolute and unencumbered title in fee simple. The Judgment also awarded Ms. Risman possession of the property and directed the Sheriff of Nassau County to eject petitioner from the property and put Ms. Risman in possession.[1]

Petitioner appealed to New York Supreme Court, Appellate Division, Second Department. After briefing was completed, but before oral argument in the Appellate Division on May 26, 2006, this Court rendered its decision in *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708 (2006). In a Decision and Order rendered on August 1, 2006 New York Supreme Court, Appellate Division, Second Department affirmed the Judgment of New York Supreme Court. *Temple Bnai Shalom of Great Neck v. Village of Great Neck Estates*, 32 A.D.3d 391, 820 N.Y.S.2d 104 (2d Dept. 2006), *lv. denied*, 8 N.Y.3d 813, 868 N.E.2d 235, 836 N.Y.S.2d 552, *reargument denied*, 9 N.Y.3d 899, 874 N.E.2d 745, 842 N.Y.S.2d 778 (2007).

The Appellate Division held that

> Risman provided the plaintiff with sufficient notice of the right to redeem the tax lien by sending notice by certified mail to the plaintiff, to the plaintiff's president, and to the former

1. Following entry of judgment, the property was apparently sold by Ms. Risman, and may have been sold again while appeal proceedings were pending in New York. All purchasers of the property have received actual notice of this action and the dispute regarding title to the property.

> owner, who was also the president's spouse. The fact that the notices were returned 'unclaimed' after numerous attempts at delivery did not render the notices deficient *** as 'the means selected for providing notice was "reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity" ' to redeem the outstanding tax lien (*Matter of Beckman v. Greentree Sec.*, 87 N.Y.2d 566, 570, 640 N.Y.S.2d 845, 663 N.E.2d 886, *quoting Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L.Ed. 865 ***).

32 A.D.3d at 392, 20 N.Y.S.2d at 105. The court wrote that "[c]ontrary to the plaintiff's contention at oral argument, the recent decision in *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 does not compel a different conclusion." 32 A.D.3d at 392, 820 N.Y.S.2d at 105. The Appellate Division found *Jones* "factually inapposite to the matter before us." *Id.* at 393, 820 N.Y.S.2d at 106.

Petitioner timely moved for reargument or leave to appeal to the New York State Court of Appeals in the Appellate Division, Second Department, which denied the motion by Order entered on November 16, 2006. Petitioner's timely motion for leave to appeal in the New York State Court of Appeals was denied by Order entered on May 3, 2007. Petitioner's timely motion for reargument of its motion for leave to appeal in the New York State Court of Appeals was denied in an Order entered on September 6, 2007.

REASONS FOR GRANTING THE PETITION

In *Harner v. v. County of Tioga*, 5 N.Y.3d 136, 833 N.E.2d 255, 800 N.Y.S.2d 112 (2005), the New York State Court of Appeals left unanswered the question whether notice of the right to redeem a tax sale sent to the owner of record by certified mail only complies with constitutional due process requirements when the notice is returned as unclaimed and no further steps are taken to give actual notice to the owner.

In *Jones*, this Court answered the question, holding that when notice of a tax sale of property is sent by certified mail only to the property owner and it is returned by the post office unclaimed, the due process clause of the Fourteenth Amendment requires the state to take additional reasonable steps to attempt to provide actual notice to the owner before selling the property.

The state courts in New York have failed to apply the rule of law established by this Court in *Jones*, and have refused to apply it to find a returned certified mail notice of a tax sale is constitutionally deficient in cases decided since *Jones* was handed down by this Court. Instead, New York State courts have created what is in effect an irrefutable presumption that multiple attempts at serving a tax notice by certified mail to a current and correct address with no proof in the record that the owner and/or occupant were not home or were otherwise unavailable for delivery is constitutional on the ground that "the intended recipients simply were 'attempting to avoid notice by ignoring the certified mailings' and that attempts at alternative methods of giving notice were unnecessary and would prove futile." *Temple Bnai*,

32 A.D.3d at 393, 820 N.Y.S.2d at 106. This presumption is in stark conflict with the explicit holdings in *Jones* and the recent application of *Jones* by the Second Circuit in a case arising out of New York.

Thus, the state courts of New York have staked out a position in direct conflict with *Jones* and the federal courts in New York. The Supreme Court should grant certiorari, vacate the order of the Appellate Division, Second Department, and remand this matter for further proceedings or grant review to ensure that the state courts of New York do not ignore this Court's explicit holdings in *Jones*, and to ensure that citizens of New York receive equal treatment in state and federal courts.

I. REVIEW IS WARRANTED BECAUSE NEW YORK STATE COURTS HAVE FAILED TO APPLY OR REJECTED THE RULE OF LAW ESTABLISHED IN *JONES v. FLOWERS*

In this case, the Appellate Division, Second Department noted that *Jones* "involved a certified mailing of a notice of tax lien sale by a governmental official to a single address, and there was proof that the property owner had moved and that "[n]obody was home to sign for the letter" (126 S. Ct. at 1712)." 32 A.D.3d at 392, 820 N.Y.S.2d at 105-106. The court then purported to distinguish *Jones* on three factual grounds that clearly lack constitutional merit, thus demonstrating that it rejected application of the rule of law in *Jones*.

First, the court noted that whereas *Jones* involved notice of the sale of the tax lien, "in the case at bar, the notice of tax lien sale had already been given, and the

sale itself had already occurred. The certified mail notice in this case concerned the right to redeem ***." 32 A.D.3d at 393, 820 N.Y.S.2d at 106. This is a factual distinction without a constitutional difference. In fact, it is clear that a final notice of redemption is more critical and significant than the initial notice of a tax lien sale. The right to redeem the property from the tax lien sale before the deed to the taxpayer's property is passed by the municipality is the final step in the process and the final time that the property owner can avert the forfeiture of the property. Thus, if anything, due process must ensure that the final notice of redemption is sent in a constitutionally sufficient manner "reasonably calculated to reach the party." *Jones*, 126 S. Ct. at 1716; *Luessenhop v. Clinton County*, 466 F.3d 259, 262 (2d Cir. 2006), *rev'g*, 378 F. Supp. 2d 63, 71-72 (N.D.N.Y. 2005) (*Jones* applies equally to a "final redemption notice" as to an initial notice of tax lien sale).

Second, the New York court wrote that "[t]he certified mail notice in this case *** was sent not by a governmental entity or official, but by the private citizen who previously had purchased the tax lien." 32 A.D.3d at 393, 820 N.Y.S.2d at 106. Notably, neither the Village nor Ms. Risman ever argued below that petitioner's constitutional challenge could be rejected because no due process claim could be made where the notice was sent by a private individual pursuant to the state statute that established the mandatory procedures for providing the notice, specifically NY RPTL § 1464. Clearly, Ms. Risman's action in sending the notice of redemption by certified mail only and her inaction in taking no additional steps to give notice when all three certified mailings were returned to her "unclaimed," and the

Village's conduct in providing Ms. Risman with a Treasurer's deed to the property after she supplied this proof to the Village constitutes "state action" for purposes of the due process clause of the Constitution. *See, e.g., Dennis v. Sparks*, 449 U.S. 24, 101 S. Ct. 183, 186 (1980) ("to act 'under color of' state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting *** 'under color' of law for purposes of § 1983 actions"); *West v. Atkins*, 487 U.S. 42, 108 S. Ct. 2250 (1988); *Kia P. v. McIntyre*, 235 F.3d 749, 755 (2d Cir. 2000) ("The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.").

Notably, in contrast with its decision in this case, the Appellate Division, Second Department has subsequently applied *Jones* in a case where the notice of tax foreclosure was also sent, as required by the Nassau County Administrative Code, by the lien holder rather than "a governmental entity or official." 32 A.D.3d at 393, 820 N.Y.S.2d at 106; *see 89 Pine Hollow Road Realty Corp. v. American Tax Fund, Foothill*, 41 A.D.3d 771, 840 N.Y.S.2d 85 (2d Dept. 2007).

Third, the Second Department noted that in *Jones* only one certified mailing was sent, whereas in this case "multiple mailings were sent to the various potential recipients at their current and correct addresses, and

were returned unclaimed only after repeated attempts at delivery had been made" and there was no proof that "any of the potential recipients was not at home or was otherwise legitimately unavailable to sign for the mailing." 32 A.D.3d at 393, 820 N.Y.S.2d at 106. This purported distinction by the Appellate Division directly conflicts with this Court's explicit rule of law in *Jones:*

> The return of the certified letter marked "unclaimed" meant either that *Jones still lived at 717 North Bryan Street, but was not home when the postman called and did not retrieve the letter at the post office,* or that Jones no longer resided at that address. *One reasonable step primarily addressed to the former possibility would be for the State to resend the notice by regular mail, so that a signature was not required.* The Commissioner says that use of certified mail makes actual notice more likely, because requiring the recipient's signature protects against misdelivery. But that is only true, of course, when someone is home to sign for the letter, or to inform the mail carrier that he has arrived at the wrong address. *** [T]he use of certified mail might make actual notice less likely in some cases – the letter cannot be left like regular mail to be examined at the end of the day, and it can only be retrieved from the post office for a specified period of time. ***
>
> Other reasonable follow up measures, directed at the possibility that Jones had moved *as well as that he had simply not retrieved the*

> *certified letter, would have been to post notice on the front door, or to address otherwise undeliverable mail to "occupant."* Most States that explicitly outline additional procedures in their tax sale statutes require just such steps. See n 2, supra. Either approach would increase the likelihood that the owner would be notified that he was about to lose his property, given the failure of a letter deliverable only to the owner in person. *That is clear in the case of an owner who still resided at the premises.*

547 U.S. at 234, 126 S. Ct. at 1718-1719 (emphasis supplied).

Thus, in *Jones*, just as in this case, it was undisputed that the address to which the notice was sent by certified mail was correct, and that Jones's daughter lived at the property when the notice of tax sale was sent by certified mail and she failed or refused to claim it. Moreover, the Appellate Division, Second Department clearly overlooked the undisputed fact that multiple certified mailings were sent in *Jones*, and the Commissioner also published notice of the public sale in a local newspaper. Thus, in the fourth consecutive year that Jones failed to pay his taxes, the Commissioner sent Jones a certified letter that was returned "unclaimed," but two years later the Commissioner published a notice of public sale in the local newspaper, and several months after the publication, the Commissioner sent another certified letter to Jones informing him of a third-party's offer to purchase the property, which was also returned as "unclaimed." *Id.* at 223-224, 126 S. Ct. at 1712. As the Supreme Court stated in *Jones*: "We do not think that a

person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed. *** Although the State may have made a reasonable calculation of how to reach Jones, it had good reason to suspect when the notice was returned that Jones was "no better off than if the notice had never been sent." *Id.* at 230, 126 S. Ct. at 1716.

Thus, *Jones* rejects what the Second Department here called a "strong inference," but has in reality been applied by several New York State courts as an "irrefutable presumption" that multiple attempts at serving a tax notice by certified mail to a current and correct address with no proof that the owner and/or occupant were not home or were otherwise unavailable for delivery is constitutional on the ground that "the intended recipients simply were 'attempting to avoid notice by ignoring the certified mailings' and that attempts at alternative methods of giving notice were unnecessary and would prove futile." 32 A.D.3d at 393, 820 N.Y.S.2d at 106, *quoting Harner v. County of Tioga*, 5 N.Y.3d at 141, 833 N.E.2d at 258, 800 N.Y.S.2d at 115; *citing Matter of County of Clinton v. Bouchard*, 29 A.D.3d 79, 83, 810 N.Y.S.2d 565 (3d Dept. 2006); *Luessenhop v. Clinton County*, 378 F. Supp. 2d 63, 71-72 (N.D.N.Y. 2005), *rev'd*, 466 F.3d 259 (2d Cir 2006).

In *Matter of County of Clinton v. Bouchard*, 29 A.D.3d 79, 810 N.Y.S.2d 565 (3d Dept. 2006), the New York Supreme Court, Appellate Division, Third Department relied on the Northern District of New

York's decision in *Luessenhop*, which was later reversed, and articulated this "irrefutable presumption" as follows:

> The fact that the certified mail – sent to the correct address – was returned as "unclaimed" after several notices were left during delivery attempts does not render petitioner's efforts at personal notice constitutionally infirm ***.
>
> Here, unlike mail returned as "undeliverable" *** when the mail was returned to petitioner as "unclaimed," which did not connote an invalid address, petitioner could have reasonably believed that respondent was attempting to avoid notice by ignoring the certified mailings (*see Matter of Harner v County of Tioga*, *supra* at 141, 800 N.Y.S.2d 112, 833 N.E.2d 255). Indeed, petitioner's subsequent verification that the notice had been sent to the correct address would support that conclusion and no further search was required (*see Kennedy v Mossafa*, *supra* at 10, 759 N.Y.S.2d 429, 789 N.E.2d 607; *Luessenhop v Clinton County, N.Y.*, 378 F.Supp.2d 63, 72 [2005], *supra*).

29 A.D.3d at 83, 810 N.Y.S.2d at 569.

Similarly, in *89 Pine Hollow Road Realty Corp. v. American Tax Fund, Foothill*, 41 A.D.3d 771, 840 N.Y.S.2d 85 (2d Dept. 2007), the New York Supreme Court, Appellate Division, Second Department refused to apply the explicit rule of law established by *Jones* in an action to set aside a deed issued in a tax lien foreclosure proceeding. The defendant, ATF, as the lien

holder, had the obligation to notify the plaintiff – by certified mail – of its intent to accept conveyance of the subject property from the County Treasurer pursuant to its purchase of a tax lien to the property under the applicable provisions of the Nassau County Administrative Code. *Id.* at 772-773, 840 N.Y.S.2d at 87. It was undisputed that the certified mail notice was sent to the correct and current address, it was retuned unsigned with the word "Refused" handwritten on it and the envelope containing the notice unopened, the tenant at the premises refused to accept receipt of the notice, and no further attempt was made to notify the plaintiff of the foreclosure. *Id.* at 773, 840 N.Y.S.2d at 87.

Although the Appellate Division found a question of fact whether the plaintiff was deprived of due process in receiving notice under *Jones*, it did so only because "[u]nder the unusual circumstances presented, including the death of the [plaintiff's] officer and sole shareholder just 11 days before service of the notice by ATF, the constitutional adequacy of the notice ought not to be determined in this case without the benefit of a full evidentiary record." *Id.* at 774, 840 N.Y.S.2d at 88. The Appellate Division denied the defendant's motion for summary judgment dismissing the complaint and cancelling a notice of pendency only as premature, with leave to renew upon completion of discovery, whereas under *Jones* the court should have granted summary judgment to the plaintiff and held the notice of tax foreclosure unconstitutional under the undisputed facts of the case.[2]

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2. Notably, the same New York appellate court that rejected the application of *Jones* in this case on the grounds that the (Cont'd)

See also Bourne v. New York City Water Bd., 15 Misc.3d 1109(A), 836 N.Y.S.2d 497 (Sup. Ct., Kings Co. 2007) (even if notice of intent to surcharge properties sent to the property owners were returned unclaimed, notice would not be deficient, citing *Temple Bnai Shalom v. Village of Great Neck Estates*, 32 A.D.3d 391, 392, 820 N.Y.S.2d 104 (2006); *cf. County of Sullivan v. Basile*, 43 A.D.3d 598, 840 N.Y.S.2d 676 (3d Dept. 2007) (notice of tax foreclosure proceeding sent by regular and certified mail and neither returned constitutes sufficient notice under constitutional due process, citing *Jones*).

II. REVIEW IS WARRANTED BECAUSE THERE IS UNEQUAL APPLICATION OF *JONES V. FLOWERS* AND TREATMENT OF PROPERTY OWNERS BETWEEN NEW YORK'S STATE AND FEDERAL COURTS

Unlike the New York State courts, the Second Circuit, applying *Jones* to a case arising out of New York, has rejected this "irrefutable presumption" when multiple certified mailings are returned unclaimed from the correct and current address of the property owner and found that such notice violates due process. Thus, a clear and unequal dichotomy has developed between litigants in New York's state and federal courts over the

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(Cont'd)

"certified mail notice *** was sent not by a governmental entity or official, but by the private citizen who previously had purchased the tax lien" as required by NY RPTL § 1464, 32 A.D.3d at 393, 820 N.Y.S.2d at 106, had no trouble applying *Jones* in *ATF* where the notice was also sent, as required by the Nassau County Administrative Code, by the lien holder rather than "a governmental entity or official." *Id.*

application of *Jones* and the constitutionality of multiple unclaimed certified mailings of a final redemption notice.

Luessenhop v. Clinton County, 378 F. Supp. 2d 63 (N.D.N.Y. 2005), *rev'd* 466 F.3d 259 (2d Cir. 2006), *on remand*, 2007 WL 1063650 (N.D.N.Y. 2007), involved four consolidated appeals. In one case, Luessenhop was the owner of two parcels of land located in Clinton County, New York, but her permanent address was 2944 Upton Street, N.W., Washington, D.C. At times during 2002, however, she temporarily lived in London, England. In the early 1990s, Luessenhop frequently did not timely pay her property taxes. However, when the County would send her a notice of foreclosure, i.e., a "final redemption notice," it was her practice to pay a sufficient amount of the back taxes to avoid losing title to her property. *Id.* at 262. In 2000 and 2001 Luessenhop fell behind on her taxes again. The County first sent a notice of arrears to Luessenhop's D.C. address, via regular mail, in January 2002 without response. On October 4, 2002, the County sent Luessenhop a notice of foreclosure, by certified mail, explaining that due to her failure to satisfy her property tax debt, foreclosure proceedings had begun, and to avoid loss of ownership Luessenhop must pay her taxes or respond prior to January 17, 2003. This notice of foreclosure was, therefore, in effect a notice of redemption. In addition, the County posted a notice in the Clinton County Courthouse, and published a notice in two Clinton County newspapers once a week for three non-consecutive weeks. When the notice of foreclosure sent by certified mail was returned to the County as "unclaimed," the County's staff checked the tax rolls and confirmed that the D.C. address was correct, but the County undertook no further efforts to contact Luessenhop. *Id.* at 261-262.

Following Luessenhop's inaction, an order of default was signed and entered in 2003 immediately transferring title of Luessenhop's property to the County. Thereafter, Luessenhop offered to pay her tax debt but the County refused to accept the payment, explaining that January 17, 2003 was the "final day of redemption." *Id.* Luessenhop moved in New York State Supreme Court to vacate the default judgment, but her motion was denied, which was affirmed by the Appellate Division, Third Department. The New York State Court of Appeals dismissed her motion for leave to appeal. *Luessenhop v. Clinton County*, 100 N.Y.2d 637, 801 N.E.2d 418, 769 N.Y.S.2d 197 (2003). Luessenhop then filed this suit in the United States District Court for the Northern District of New York seeking, *inter alia*, an injunction preventing the County from auctioning her property, as well as actual and punitive damages. The District Court found, prior to the Supreme Court's decision in *Jones*, that the County's attempted notification was constitutionally adequate and it granted summary judgment for the County. 466 F.3d at 262.

The Second Circuit, reversed, vacated the judgment, and remanded for further proceedings, holding:

> Luessenhop's case is similar to the actual facts of *Jones*. In both cases the government sent the taxpayer a notice of foreclosure via certified mail. In both cases the item was returned as "unclaimed," and in both cases the government took no further action other than posting the notice in a newspaper. *Jones* held that this inaction renders the attempted notice constitutionally deficient, as long as additional

> steps are practicable. In Luessenhop's case, it would not have been a terrible burden for the County to take at least one of the steps suggested in Jones; viz., sending a first-class letter to Luessenhop's Washington, D.C. address. Accordingly, the County's effort to provide notice to Luessenhop was insufficient to satisfy due process. As such, the judgment of the district court is reversed and the case is remanded for proceedings consistent with this opinion.

Id. at 270. In fact, more steps were taken to provide notice to the property owner in *Luessenhop* than in *Jones* and certainly than in this case. Not only did the County check the address to be sure it was correct when the certified mail was returned "unclaimed," but it also posted a notice in the local courthouse and published the notice of redemption in a local newspaper. The Second Circuit found, however, that this additional measure "does not save the County's constitutionally inadequate notification." *Id.* at 270, n. 6.

Thus, merely by virtue of the fact that petitioner commenced this action in state court rather than in federal court in New York, petitioner has been deprived of due process in receiving adequate notice of the right to redeem its property from the tax sale conducted by the Village under a state statute, NY RPLR § 1464, that is clearly unconstitutional under *Jones*.

III. AN ORDER GRANTING CERTIORARI, VACATING THE JUDGMENT BELOW, AND REMANDING FOR FURTHER CONSIDERATION ("GVR") IS AN APPROPRIATE EXERCISE OF THIS COURT'S DISCRETIONARY CERTIORARI JURISDICTION IN THIS CASE

This Court has already granted certiorari, vacated a state court judgment, and remanded the case for reconsideration in light of *Jones*. *See Estate of Lowe ex rel. Harris v. Apex Tax Investments, Inc.*, __ U.S. __, 126 S. Ct. 2287 (2006), *vacating Apex Tax Invs., Inc. v. Lowe (In re County Collector)*, 217 Ill.2d 1, 838 N.E.2d 907 (2005) (notice of right to redemption constitutional despite certified mail returned unclaimed); *see Apex Tax Investments, Inc. v. Lowe (In re County Collector)*, 2007 Ill. LEXIS 450 (2007) (on remand). Although the petition for certiorari in this case was apparently pending when *Jones* was decided, this Court has also granted certiorari, vacated a lower court judgment, and remanded for reconsideration ("a GVR order") under other circumstances.

For example, in *Erickson v. Pardus*, __ U.S. __, 127 S. Ct. 2197 (2007), this Court recently issued a GVR order solely because "the holding [below] departs in so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure ***." *Id.* Similarly, in *Youngblood v. West Virginia*, __ U.S. __, 126 S. Ct. 2188 (2006), the Supreme Court granted certiorari, vacated the state court judgment, and remanded for further proceedings although there was no new decision of this Court to be considered by the state court on remand.

As this Court explained in *Lawrence v. Chater*, 516 U.S. 163, 112 S. Ct. 604 (1996), "the GVR order has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices. We have GVR'd in light of a wide range of developments, including our own decisions ***." *Id.* at 166, 116 S. Ct. at 606. This case falls within the first category of GVR orders recognized in *Lawrence* – "intervening factors" – because it includes "at least Supreme Court decisions rendered so shortly before the lower court's decision that the lower court had no 'opportunity' to apply them." *Id.* at 169, 116 S. Ct. at 607. In *Lawrence* this Court noted that in *Robinson v. Story*, 469 U.S. 1081, 105 S. Ct. 583 (1984) "we GVR'd for further consideration in light of a Supreme Court decision rendered almost three months before the summary affirmance by the Court of Appeals that was the subject of the petition for certiorari." 516 U.S. at 169, 116 S. Ct. at 607.

Here, *Jones* was decided after briefing was completed in the Appellate Division, and only one month before oral argument of the appeal and three months before the court's short decision rejecting the application of *Jones*. Even where the recent Supreme Court precedent has been briefed to the lower court, this Court has issued an GVR order. *See id.* at 170, 116 S. Ct. at 608, *citing Stutson v. United States*, 516 U.S. 193, 116 S. Ct. 600 (1996). This is particularly appropriate where, as here, "recent events have cast substantial doubt on the correctness of the lower court's summary disposition." *Lawrence*, 516 U.S. at 170, 116 S. Ct. at 608. This Court has made clear that a GVR order is appropriate where, as here,

> recent developments that we have reason to believe the court below did not fully consider,

> reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation ***.

Id. at 167, 116 S. Ct. at 607. In fact, we know that the Appellate Division, Second Department has already reconsidered one of the facts that it used to distinguish *Jones* in this case, specifically that the notice was sent by the lienholder rather than the government. *See 89 Pine Hollow Road Realty Corp. v. American Tax Fund, Foothill*, 41 A.D.3d 771, 840 N.Y.S.2d 85 (2d Dept. 2007). On remand the Second Department would also have the benefit of the Second Circuit's decision in *Luessenhop*, 466 F.3d 259, applying *Jones* to facts virtually identical to the facts in this case.

Exercise of this Court's discretionary certiorari jurisdiction to issue a GVR order in this case will also "conserve[] the scarce resources of this Court that might otherwise be expended on plenary consideration, assist[] the court below by flagging a particular issue that it does not appear to have fully considered, *** and alleviate[] the '[p]otential for unequal treatment' that is inherent in our inability to grant plenary review of all pending cases raising similar issues, see *United States v. Johnson*, 457 U.S. 537, 555, n. 16, 102 S. Ct. 2579, 2591, n. 16 (1982)." *Lawrence*, 516 U.S. at 167, 116 S. Ct. at 606-607. A GVR order in this case will also "improve the fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal ***." *Id.* at 168, 116 S. Ct. at 607.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that the Supreme Court grant certiorari.

DATED: December 5, 2007

Respectfully submitted,

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Attorneys for Petitioner

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APPENDIX

APPENDIX A — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT DATED AUGUST 1, 2006

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

Argued - May 26, 2006

FRED T. SANTUCCI, J.P.
GABRIEL M. KRAUSMAN
WILLIAM F. MASTRO
PETER B. SKELOS, JJ.

2005-05783

Temple Bnai Shalom of Great Neck, etc.,

appellant,

v.

Village of Great Neck Estates, et al.,

respondents,

et al.,

defendants.

DECISION & ORDER

In an action, inter alia, for a judgment declaring a certain tax deed void, the plaintiff appeals from a judgment of the Supreme Court, Nassau County (Davis, J.), dated May 25, 2005, which, upon an order of the same

court dated May 4, 2005, inter alia, granting the cross motion of the defendant Florence Risman for summary judgment on her counterclaim to quiet title and, in effect, upon renewal, adhering to a prior determination of the same court denying that branch of the plaintiff's motion which was for leave to amend the complaint, barred the plaintiff from asserting any claims to the subject real property and declared that the defendant Florence Risman has absolute and unencumbered title in fee simple to the subject property.

ORDERED that the judgment is affirmed, with one bill of costs payable to the respondents.

The Supreme Court properly determined that the plaintiff did not have standing to challenge the constitutionality of the sale of the tax lien to the defendant Florence Risman and the notice provided by the defendant Village of Great Neck Estates with respect thereto (*see Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 769, 570 N.Y.S.2d 778, 573 N.E.2d 1034; *Matter of Dairylea Coop. v. Walkley*, 38 N.Y.2d 6, 9, 377 N.Y.S.2d 451, 339 N.E.2d 865). The plaintiff was not the record owner of the property subject to the lien at the time of the sale and failed to demonstrate that it suffered a cognizable injury as a result of any actions by the village (*see Matter of Galvani v. Nassau County Police Indem. Review Bd.*, 242 A.D.2d 64, 67, 674 N.Y.S.2d 690; *see also NYCTL 1996-1 Trust v. King*, 304 A.D.2d 629, 630-631, 758 N.Y.S.2d 374; *Bancplus Mortgage Corp. v. Galloway*, 203 A.D.2d 222, 223, 610 N.Y.S.2d 60).

Furthermore, with respect to the notice of redemption, Risman provided the plaintiff with sufficient notice of the right to redeem the tax lien by sending notice by certified mail to the plaintiff, to the plaintiff's president, and to the former owner, who was also the president's spouse. The fact that the notices were returned "unclaimed" after numerous attempts at delivery did not render the notices deficient (*see Matter of Harner v. County of Tioga*, 5 N.Y.3d 136, 138, 800 N.Y.S.2d 112, 833 N.E.2d 255), as "the means selected for providing notice was 'reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity' " to redeem the outstanding tax lien (*Matter of Beckman v. Greentree Sec.*, 87 N.Y.2d 566, 570, 640 N.Y.S.2d 845, 663 N.E.2d 886, quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865; *see Kennedy v. Mossafa*, 100 N.Y.2d 1, 9-10, 759 N.Y.S.2d 429, 789 N.E.2d 607).

Contrary to the plaintiff's contention at oral argument, the recent decision in *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708, 164 L.Ed.2d 415 does not compel a different conclusion. While the United States Supreme Court determined that an unclaimed certified mail notice sent to the property owner's former address, without more, was insufficient to satisfy the requirements of due process under the circumstances there presented, *Jones v. Flowers*, *supra* involved a certified mailing of a notice of tax lien sale by a governmental official to a single address, and there was proof that the property owner had moved and that "[n]obody was home to sign for the

letter" (126 S.Ct at 1712). Under those circumstances, a majority of the Court reasoned that the State could not simply do nothing once it learned that the notice was unclaimed, but had to attempt some other means of providing notice to the property owner if practicable.

Jones v. Flowers, *supra* is factually inapposite to the matter before us. Indeed, in the case at bar, the notice of tax lien sale had already been given, and the sale itself had already occurred. The certified mail notice in this case concerned the right to redeem, and it was sent not by a governmental entity or official, but by the private citizen who previously had purchased the tax lien. Additionally, it is conceded that multiple mailings were sent to the various potential recipients at their current and correct addresses, and were returned unclaimed only after repeated attempts at delivery had been made. Moreover, there is no suggestion in this record that any of the potential recipients was not at home or was otherwise legitimately unavailable to sign for the mailing. Accordingly, considering the "unique information about [the] intended recipient[s]" (126 S.Ct at 1710) which can be gleaned from the history of this matter, and taking "into account the status and conduct of the owner in determining whether notice was reasonable" (*Kennedy v. Mossafa*, *supra* at 11, 759 N.Y.S.2d 429, 789 N.E.2d 607), the defendants could reasonably draw the strong inference that the intended recipients simply were "attempting to avoid notice by ignoring the certified mailings" (*Matter of Harner v. County of Tioga*, *supra* at 141, 800 N.Y.S.2d 112, 833 N.E.2d 255; *see Matter of County of Clinton v. Bouchard*,

29 A.D.3d 79, 810 N.Y.S.2d 565), and that attempts at alternative methods of giving notice were unnecessary and would prove futile.

The Court providently exercised its discretion in denying that branch of the plaintiff's motion which was for leave to amend the complaint (*see Evans v. Ellis*, 13 A.D.3d 577, 786 N.Y.S.2d 334).

The plaintiff's remaining contentions either are unpreserved for appellate review, are without merit, or need not be reached in view of the foregoing.

SANTUCCI, J.P., KRAUSMAN, MASTRO and SKELOS, JJ., concur.

ENTER:

s/ James Edward Pelzer
James Edward Pelzer
Clerk of the Court

APPENDIX B — ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK DATED MAY 4, 2005

SHORT FORM ORDER

SUPREME COURT – STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 7
NASSAU COUNTY

SUBMISSION DATE: 03/17/05
INDEX No.: 13603/02

TEMPLE BNAI SHALOM OF GREAT NECK,
a corporation Organized under the New York
Religious Corporation Law,

Plaintiff,

-against-

Village of Great Neck Estates, County Clerk of
Nassau County, Florence Risman, and
State of New York,

Defendants.

MOTION SEQ. #12, 13

The following papers read on this motion:

Notice of Motion/Order to Show Cause	X
Answering Papers	X
Reply	X
Briefs: Plaintiff's/Petitioner's	
Defendant's/Respondent's	

Appendix B

Upon the foregoing papers, plaintiff's motion for an order granting renewal of this Court's order dated August 20, 2004, upon renewal, permitting plaintiff to amend the complaint to add Ona Guthartz; to add additional causes of action; to grant reargument to plaintiff as to the awarding of summary judgment to Florence Risman and to amend the complaint to include a cause of action to quiet title is denied. Defendant Florence Risman's cross motion for an order granting summary judgment to her is granted.

The instant action stems from the sale of a 1998 village tax lien to the defendant Florence Risman by the defendant Village of Great Neck Estates. This Court, by order dated August 20, 2004, held that the plaintiff did not have standing to challenge the tax lien as they were not entitled to notice of the sale nor did they have standing to challenge the sale. The court further held that plaintiff was not entitled to attorneys fees and denied plaintiff's motion to amend the complaint for their failure to serve a copy of the proposed amendment with the motion and on the proposed intervener.

A motion to re-argue is to be granted when the court overlooks or misapprehends the law or facts in the determination of its prior decision. *CPLR § 2221* (d); see *Diorio v. City of New York*, 202 A.D.2d 625, 609 N.Y.S.2d 304 (2d Dept. 1994); *Pro Brokerage Inc. v. Home Ins. Co.*, 99 A.D.2d 971, 472 N.Y.S.2d 661 (1st Dept. 1984). The purpose of a motion to reargue is not to afford an aggrieved party a second chance. *Pro Brokerage, Inc. v. Home Ins. Co.*, supra. The party seeking a motion to

reargue must set forth the facts or law the court overlooked in making its original decision. The court did not overlook or misapprehend the facts as presented by the parties or misapplied the law. Accordingly, plaintiffs motion to re-argue is denied.

A motion to renew may be made upon the discovery of evidence that was not known to the party at the time of the initial motion. CPLR § 2221(e). A motion to renew is not a basis to set forth new theories of the case. *Foley v. Roche*, 68 A.D.2d 558, 418 N.Y.S.2d 588 (1st Dept. 1979). Additionally, the court may, in its discretion, grant a motion to renew which corrects a deficiency in the original motion papers. *Federal Home Loan Mortgage Corp. v. Torres*, 238 A.D.2d 306, 656 N.Y.S.2d 297 (2d Dept. 1997). Here, plaintiff seeks to renew their motion to amend the complaint to include Ona Guthartz as a party and to add a cause of action to quiet title. "Although leave to amend a complaint should be freely granted, the movant must make some evidentiary showing that the proposed amendment has merit, and a proposed amendment that is plainly lacking in merit will not be permitted." *Monteiro v. R.D. Werner, Inc.*, 301 A.D.2d 636, 754 N.Y.S.2d 328 (2d Dept. 2003); see also, *Gannett Suburban Newspapers v. El-Kam Realty Co.*, 306 A.D.2d 314, 760 N.Y.S.2d 680 (2d Dept. 2003); *Evans v. Ellis*, 13 A.D.3d 517, 786 N.Y.S.2d 334 (2d Dept. 2004). Here, the Court finds that the plaintiff has failed to make an evidentiary showing that the proposed amendment has merit.

Appendix B

In the August 20, 2004 decision, this Court held that plaintiff lacked standing to bring the instant action as well as the fact that the notice requirements were met by the defendants with regard to the lien sale. Based on that decision, this court finds that defendant Florence Risman is entitled to summary judgment on the RPAPL Article 15 claim.

The proposed order as annexed to the moving papers, shall be forwarded this date to the Motion Support Unit of this Court, and should it be found to be consistent with the terms of this and prior orders, it shall be executed upon completion of such review.

This decision constitutes the order and judgment.

Dated: MAY –4 2005

s/ Kenneth A. Davis
HON. KENNETH A. DAVIS

APPENDIX C — JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK DATED MAY 25, 2005

At an IAS Part 7 of the Supreme Court of the State of New York held in and for the County of Nassau at the Courthouse thereof, 100 Supreme Court Drive, Mineola, New York on the 25 day of May, 2005

PRESENT: KENNETH A. DAVIS

HON. KENNETH A. DAVIS
JUSTICE

INDEX NO.: 13603/02

TEMPLE BNAI SHALOM OF GREAT NECK, A CORPORATION ORGANIZED UNDER THE NEW YORK RELIGIOUS CORPORATION LAW,

Plaintiff,

-against-

VILLAGE OF GREAT NECK ESTATES, COUNTY CLERK OF NASSAU COUNTY, FLORENCE RISMAN, AND STATE OF NEW YORK,

Defendants.

Appendix C

JUDGMENT

Upon the Notice of Motion dated January 31, 2005, and the affirmation annexed thereto of JOSHUA LEVY, affirmed January 31, 2005, and the exhibits annexed thereto, and upon all the proceedings had hereon, and upon the Order of this Court dated August 20, 2004,

NOW, upon the motion of JOSHUA LEVY,

ORDERED that defendant FLORENCE RIMSAN'S motion is granted, and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiff TEMPLE BNAI SHALOM OF GREAT NECK, and every person claiming under the plaintiff, be barred from all claim to an estate or interest in the real property described herein, and it is further

ORDERED, ADJUDGED AND DECREED that the defendant FLORENCE RISMAN is vested with an absolute and unencumbered title in fee simple to real property described herein,

ORDERED, ADJUDGED AND DECREED that the defendant FLORENCE RIMSAN is awarded possession of the subject premises and that the defendant FLORENCE RIMSAN be put in possession thereof, and the plaintiff and any party claiming under the plaintiff in possession thereof be removed from possession, and it is further

Appendix C

ORDERED, that the Sheriff of Nassau County be and he hereby is ordered upon receipt of a certified copy of this order to enter upon the premises hereinafter described, commonly known as 68 Clover Drive, Great Neck, NY, and eject therefrom the plaintiff, and every person holding the same, or any part thereof, under the said plaintiff and adversely to the defendant FLORENCE RISMAN, and to put the defendant FLORENCE RISMAN into possession of the said premises occupied by said plaintiff or persons holding under them, and that this order be executed by the said Sheriff as though it were an execution for the delivery of possession of said premises, and it is further

ORDERED that the Nassau County Clerk is hereby directed upon payment of the proper fees, if any, to cancel and discharge a certain Notice of Pendency of Action filed by plaintiff in this action on August 16, 2002 against the subject premises, and said Clerk is hereby directed to enter upon the margin of the record of same a Notice of Cancellation referring to this order, and it is further

ORDERED, that the County Clerk, upon payment of the appropriate fees, index a copy of this Order and Judgment against the subject premises.

The subject premises hereinbefore mentioned is described as follows:

All that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being, and identified on the land and tax map

of the County of Nassau in the State of New York, as follows:

Section:	2
Block:	354
Lot(s)	90

Upon information and belief, said premises are also known as and by street number: 68 Clover Drive, Great Neck, NY.

ENTER: MAY 25 2005

s/ Kenneth A. Davis
HON. KENNETH A. DAVIS

APPENDIX D — ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK DATED AUGUST 20, 2004

SHORT FORM ORDER

SUPREME COURT – STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 7
NASSAU COUNTY

SUBMISSION DATE: 07/15/04
INDEX No.: 13603/02

TEMPLE BNAI SHALOM OF GREAT NECK,
a corporation Organized under the New York
Religious Corporation Law,

Plaintiff,

-against-

Village of Great Neck Estates, County Clerk of
Nassau County, Florence Risman,
and State of New York,

Defendants.

MOTION SEQ. #8, 9, 10, 11

Appendix D

The following papers read on this motion:

Notice of Motion/Order to Show Cause	X
Answering Papers	X
Reply	X
Briefs: Plaintiff's/Petitioner's	
Defendant's/Respondent's	

Upon the foregoing papers, defendant Florence Risman's motion for an order awarding partial summary judgment to defendant Florence Risman and dismissing those parts of the complaint and causes of action which are founded upon the plaintiff's claim that the 1998 tax lien sale was unconstitutional and violative of plaintiff's due process rights is granted. Additionally, defendant Village of Great Neck Estates' cross motion for an order awarding partial summary judgment dismissing the complaint and each cause of action against the Village of Great Neck Estates and awarding partial summary judgment dismissing all claims for attorney's fees asserted by plaintiff against the Village is granted. Furthermore, plaintiff's cross-motion for an order granting summary judgment striking defendant Risman's second affirmative defense on lack of standing or in the alterative permitting plaintiff to add Ona Guthartz as an additional party plaintiff or as a defendant is denied.

The instant action stems from the sale of a tax lien by the Village of Great Neck Estates to defendant Florence Risman. The subject tax lien was for the year 1998, when the property was owned by Ona Guthartz.

In 2000, the property was sold to plaintiff. Plaintiff now seeks to challenge the constitutionality of the tax lien.

The Court finds that the plaintiff does not have standing to challenge the tax lien as it was not the owner of record at the time the lien was issued or at the time of the sale. Plaintiff claims that it was entitled to notice of the sale. The Court finds otherwise. The law provides that notice must be given to "all parties with a substantial interest in the property whose names and addresses are reasonably ascertainable." *Kahen-Kashi v. Risman*, __ A.D.3d __, 777 N.Y.S.2d 755 (2d Dept 2004); See, also, *Zaccaro v. Cahill*, 100 N.Y.2d 884, 768 N.Y.S.2d 730 (2003); *Garden Homes Woodlands Company v. Town of Dover*, 95 N.Y.2d 516, 720 N.Y.S.2d 79 (2000); *West Branch Realty v. County of Putnam*, 293 A.D.2d 528, 740 N.Y.S.2d 135 (2d dept 2002); RPTL § 1125. Plaintiff was not known to the defendants at the time of the sale nor were they an owner of the premises. Accordingly, they were not entitled to notice nor does it have standing to challenge the sale, therefore the motion and cross motion for partial summary judgment is granted.

Additionally, the Court finds that plaintiff has not set forth sufficient grounds to warrant the award of attorney's fees. See, *Luby v. St. John's Episcopal Hospital*, 220 A.D.2d 390, 631 N.Y.S.2d 773 (2d Dept 1995); *Mastroianni v. Inc. Village of Hempstead*, 166 A.D.2d 560, 560 N.Y.S.2d 843 (2d Dept 1990); *Kovachevich v. New York City Housing Auth.*, 290 A.D.2d 325, 735 N.Y.S.2d 782 (1st Dept 2002); *Harvey v. State*, 281 A.D.2d 846, 722 N.Y.S.2d 605 (3rd Dept 2001)

Appendix D

Plaintiff's motion to amend the complaint to add Ona Guthartz as an additional plaintiff or defendant is denied. Plaintiff failed to serve a copy of the proposed amendment with the motion papers, see, *Loehner v. Simons*, 224 A.D.2d 591, 639 N.Y.S.2d 700 (2d Dept 1996); *Branch v. Abraham and Strauss*, 220 A.D.2d 474; 632 N.Y.S.2d 168 (2d Dept 1995); *Langdon v. Town of Webster*, 182 Misc.2d 603, 698 N.Y.S.2d 393 (N.Y. Sup. Ct. 1999); *Katzeff v. Cohn*, 139 Misc.2d 1076, 529 N.Y.S.2d 436 (N.Y. Sup. Ct. 1988), nor was the proposed intervener served. The plaintiff application to strike the affirmative defense of lack of standing made by Risman is denied as moot.

This decision constitutes the order and judgment.

Dated: AUG 20 2004

s/ Kenneth A. Davis
HON. KENNETH A. DAVIS J.S.C.

APPENDIX E — ORDER OF THE COURT OF APPEALS OF THE STATE OF NEW YORK DENYING MOTION FOR REARGUMENT DATED SEPTEMBER 6, 2007

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixth *day of* September 2007

2-10 Mo. No. 740

Temple Bnai Shalom of Great Neck, &c.,

Appellant,

v.

Village of Great Neck Estates et al.,

Respondents,

et al.,

Defendants.

A motion for reargument of motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Appendix E

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court